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Municipal Services And Equal Protection: Variations On A Theme By Griffin v. Illinois

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In running over the pages of our history, we shall scarcely meet with a single great event of the last seven hundred years that has not promoted equality of condition.

. . . .

Nor is this phenomenon at all peculiar to France. Wherever we look, we perceive the same revolution going on throughout the Christian world.

The gradual development of the principle of equality is, therefore, a providential fact. . . . [I]t is universal, it is lasting, it constantly eludes all human inference, and all events as well as all men contribute to its progress.

—Alexis de Toqueville, I Democracy in America 5-6 (P. Bradley ed. 1956).

A Preliminary Appraisal

> In the new industrial towns, the most elementary traditions of municipal service were absent. Whole quarters were sometimes without water even from local wells. On occasion, the poor would go from house to house in the middle-class sections, begging for water . . . . Open drains represented, despite their foulness, comparative municipal affluence. . . .[1] Block after block repeats the same formation: there are the same dreary streets, the same shadowed, rubbish-filled alleys, the same absence of open spaces for children's play and gardens. . . . [T]hose who speak glibly of urban improvements during this period . . . fight shy of the actual facts: they generously impute to the town as a whole benefits which only the more favored middle-class minority enjoyed. . . .[2]

Mumford in the above passage was speaking of nineteenth-century England, not the contemporary United States. Yet, his description of England during the industrial revolution may be applicable to many areas of the United States today.

Urban and rural slums are characterized by the nonexistence or inadequacy of most municipal services.[3] These inadequate services

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1 L. MUMFORD, THE CITY IN HISTORY 463 (1961).

2 *Id.* at 462.

3 NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 138-39, 147-48 (1968) [hereinafter cited as CIVIL DISORDERS REPORT].

tend to affect the attitudes of the residents. For example, the United States Riot Commission stated that "inadequate sanitation services are viewed by many ghetto residents not merely as instances of poor public service but as manifestations of racial discrimination."[4] The direct influence of inadequate municipal services is not limited to those people immediately affected. The Commission noted that " 'residents of areas *bordering on* slums feel that sanitation and neighborhood cleanliness is a crucial issue . . . constituting an important psychological index of 'how far gone' *their* area is.' "[5] As a generalization, it seems safe to say that the inadequacy of municipal services in large areas of both rural and urban communities is a result of the ineffective or non-existent political representation of those who live in these areas.[6]

The purpose of this article is to explore the legal arguments which may be employed to rectify the problem of inadequate municipal services. The term municipal services is used here in its broadest sense to denote those services provided by the municipality to its citizens whether in the form of labor, maintenance or improvement. The problem usually is one of the situs and the adequacy of the service. This article will first explore some of the common law and statutory remedies available to citizens not receiving adequate services. Some likely constitutional remedies will then be considered generally, followed by a discussion specifically focused upon the equal protection clause and its relation to classifications based on wealth. In conclusion, the application of the equal protection clause to the problem considered by this article will be examined. Since this is a new type of litigation it may be beneficial at the outset to explore the nature of the problem by way of illustration.

Two actions have been filed recently in a federal district court in Mississippi which exemplify the problem and which raise and argue

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There is a dearth of published studies dealing with the problem. For example, the Commission Report states that "[t]here is no known study comparing sanitation services between slum and non-slum areas." *Id.* at 138, *quoting* Robert Patricelli, Memorandum To The Commission, Nov. 16, 1967. Professor John W. Dyckman, Chairman, Department of City and Regional Planning, University of California at Berkeley, states that the problem is one with which many planners are concerned. They believe that slums are inadequately serviced but they have not documented the problem adequately. Telephone conversation with Professor John W. Dyckman, Dec. 31, 1968.

[4] CIVIL DISORDERS REPORT, *supra* note 3, at 148.

[5] *Id.* at 138 (emphasis added), *quoting* Robert Patricelli, Memorandum To The Commission, Nov. 16, 1967.

[6] "In short, the middle-class city dweller has relatively fewer needs for public services and is reasonably well positioned to move the system to his benefit." *Id.* at 148.

some of the issues that will be raised in this article.[7] The plaintiffs in each case are poor Negro residents of the defendant towns. The plaintiffs allege that the towns have underserviced[8] the areas in which they live, relative to the white areas, in the construction and maintenance of streets, sidewalks, curbs, fire hydrants, street lighting, sewerage, water pressure, and garbage collection, because they are black and poor.[9] Nearly all the above mentioned municipal services have been paid for in the past out of general revenues; only in the case of some sidewalks have special assessments against property owners been made.[10] Plaintiffs seek an order to compel the defendants to rectify past underservicing and to restrain them from expending funds for municipal services in white neighborhoods until the services in their neighborhoods have been substantially equalized.

A recent California case presented similar issues and legal problems. A complaint was filed with the California Public Utilities Commission by a group of Mexican-American farmworkers who lived in the town of Wasco.[11] Their area of the town was populated predominantly by poor Mexican-Americans. This section was served by a private water company, while the rest of the town was served by a municipal water company. The complainants alleged that the water they received was oily, turgid, bacteria-ridden and unpalatable. They also alleged that the rate they were charged for water was higher than that charged those residents of the town served by the municipal water company. This case was settled; the complainants were refunded more than $4,600 in excess charges and the water company "agreed to set up a procedure for resolving future complaints by Wasco water consumers."[12]

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[7] Hawkins v. Shaw, Civil No. DC6737, CCH POVERTY L. REP. ¶ 2400.40 (N.D. Miss., filed Nov. 21, 1967); Harris v. Itta Bena, Civil No. GC6756 (N.D. Miss., filed Nov. 21, 1967).

[8] "Underserviced" shall be used hereafter to refer to either a total lack of *or* an inadequacy of services.

[9] Hawkins v. Shaw, Civil No. DC6737, CCH POVERTY L. REP. ¶ 2400.40 (N.D. Miss., filed Nov. 21, 1967); Harris v. Itta Bena, Civil No. GC6756 (N.D. Miss., filed Nov. 21, 1967). The complaints are substantially similar (both classes of plaintiffs are represented by the NAACP Legal Defense and Educational Fund, Inc.).

[10] Answers to Interrogatories of Plaintiffs, Feb. 12, 1968, Hawkins v. Shaw, Civil No. DC6737, CCH POVERTY L. REP. ¶ 2400.40 (N.D. Miss., filed Nov. 21, 1967); Answers to Interrogatories of Plaintiffs, Jan. 31, 1968, Harris v. Itta Bena, Civil No. GC6756 (N.D. Miss., filed Nov. 21, 1967).

[11] California Pub. Util. Comm'n, File Nos. 699, IC-45691-W, CCH POVERTY L. REP. ¶ 2400.88 (Nov. 11, 1966).

[12] CEB LEGAL SERVICES GAZETTE, Aug. 1967, at 106.

Some Common Law and Statutory Remedies

Abuse of Discretion

The doctrine of the separation of powers dictates that the ordinary acts and decisions of municipal authorities are considered to be legislative in nature and not within the scope of the judicial power.[13] The provision of most municipal services is considered a discretionary function of municipal authorities. In addition to having the discretion to provide the service, municipal authorities possess discretion as to the mechanics of its provision as well.[14]

The typical challenge to the propriety of municipal expenditures for the provision of services involves a single plaintiff who complains, for example, that a particular improvement is too costly,[15] that an alternative public building site should have been chosen,[16] or that a street should or should not be widened or repaved.[17] The courts have responded with innumerable variations of the following rule:

> Assuming that the municipal authorities have acted within the orbit of their lawful authority, no principle of law is better established than that courts will not sit in review of proceedings of municipal officers . . . involving legislative discretion, except . . . in case of fraud, corruption, or arbitrary, unreasonable actions amounting to abuse of discretion.[18]

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[13] Silver v. Los Angeles, 57 Cal. 2d 39, 366 P.2d 651, 17 Cal. Rptr. 379 (1961), *cert. denied*, 369 U.S. 873 (1962). "Under such circumstances, [the city councilmen] are answerable to the electorate, but not the courts . . . ." *Id.* at 42, 366 P.2d at 653, 17 Cal. Rptr. at 381; *accord*, Santa Barbara City Council v. Superior Court, 179 Cal. App. 2d 389, 3 Cal. Rptr. 796 (1960).

[14] "It is well settled, and it has been affirmed repeatedly by numerous judicial decisions of the several jurisdictions, that in the absence of constitutional or charter restrictions, municipal discretion includes the nature and extent of the improvement, the *location* of the improvement, the plans and manner of construction, the nature and kind of material to be used . . . ." 13 E. McQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS, § 37.25, at 98-100 (3d ed. 1950) (emphasis added) [hereinafter cited as 13 McQUILLAN].

[15] *E.g.*, Parker v. Concord, 71 N.H. 468, 52 A. 1095 (1902).

[16] Old Town Dev. Corp. v. Urban Renewal Agency, 249 Cal. App. 2d 313, 57 Cal. Rptr. 426 (1967). A frequent complaint is that a public improvement, such as a garbage dump, an incinerator or some other unsightly or odoriferous public facility, is located *too close* to the plaintiff. *E.g.*, Thomas v. Grinnell, 171 Iowa 571, 153 N.W. 91 (1915); *cf.* Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967), where plaintiff alleged that the defendant had, for 17 years, selected sites for public housing in completely (or nearly so) Negro neighborhoods to maintain, or the *effect* of which was to maintain, racial segregation. If decided under principles to be developed, the site selection would have been invalidated.

[17] Denver v. Bargain Land & Inv. Co., 83 Colo. 551, 267 P. 405 (1928). *See generally* 13 McQUILLAN, *supra* note 14, at § 37.26.

[18] 2 E. McQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 10.33, at 823-24

The California case of *Manjares v. Newton*[19] presents a good example of the manner by which the key phrase "arbitrary" action or "abuse of discretion" can be interpreted by a court to curtail the unequal distribution of municipal services. The plaintiffs in *Manjares* sought a writ of mandate compelling the members of the Board of Education of the Carmel School District to resume school bus service for their children. The closest school was fifteen miles from their home; the closest regularly scheduled school bus route was more than six miles from their home. The school authorities refused to continue the service to the plaintiffs on the grounds that the costs were excessive and that a continuation of the service created the possibility that other families in similar situations might also demand such bus service. School authorities relied on a statute which provides that a school district "may provide . . . for the transportation of pupils to and from school whenever in the judgment of the board such transportation is advisable and good reasons exist therefor."[20] Noting that the district provided transportation to other children in areas farther from schools than the area in which the plaintiffs lived, the trial court directed the defendants by means of mandamus to resume service, and "concluded that the board's action in refusing transportation was arbitrary, capricious, discriminatory, and unreasonable and deprived plaintiffs of free schooling and of due process of law and equal protection of the laws."[21] The California Supreme Court affirmed on limited grounds holding that the action of the board was arbitrary and unreasonable.[22] The court declined to reach the constitutional issues of due process and equal protection. The abuse of discretion concept would appear to provide a court with an alternative means to give relief in a municipal equalization case where the court wished to avoid the constitutional issues.[23] It should be pointed out that this case dealt with the termination of an existing service and not the failure to provide a new or additional service that was necessary to equalize the service to wealthy and not-so-

(3d ed. rev. 1966) (emphasis added) [hereinafter cited as 2 McQUILLAN]; *see, e.g.*, Burns v. American Cas. Co., 127 Cal. App. 2d 198, 206, 273 P.2d 605, 610 (1954); 3 C. ANTIEAU, MUNICIPAL CORPORATION LAW §§ 23.00, 23.01, 23.11 (1967).

[19] 64 Cal. 2d 365, 411 P.2d 901, 49 Cal. Rptr. 805 (1966).

[20] CAL. EDUC. CODE § 16801.

[21] 64 Cal. 2d at 370, 411 P.2d at 905, 49 Cal. Rptr. at 809.

[22] *Id.* at 378, 411 P.2d at 910, 49 Cal. Rptr. at 814.

[23] *Manjares* is a rather liberal interpretation of the "abuse of discretion" doctrine. An example of a stricter decision states that to justify judicial interference, the abuses "should appear, not by the mere weight of the evidence, and the opinion of the greater number of witnesses, but so conclusively that all reasonable doubt is overcome." Morse v. Westport, (Mo. 1895), *rev'd on other grounds*, 136 Mo. 276, 37 S.W. 932 (1896); *see* 13 McQUILLAN, *supra* note 14, at 679 n.91.

wealthy communities. It would seem to be easier to establish an abuse of discretion by the termination of the existing service than it would be to establish such abuse by the failure to provide a new or additional service.

The Public Utility Doctrine[24]

The essence of the public utility doctrine is that a municipality which provides services similar to those provided by privately owned public utilities has a duty to serve all the members of the public within its territorial boundaries in an equal and nondiscriminatory manner.[25] There are two major limitations upon the doctrine. First, a decision not to extend services to areas where those services are sought, when based upon a bona fide business judgment that extension of the service would be inordinately expensive due to topographical peculiarities or low population density of the areas, will be upheld.[26] Secondly, the class of services subject to the doctrine is limited to those services traditionally furnished by private utilities, *e.g.*, transportation, telephone, water, garbage, gas, and electricity.[27] These are all services which are furnished in discrete amounts capable of unit pricing. By contrast, services such as fire and police protection, street cleaning and street-trash pickup, street maintenance and other similar services, the cost of which cannot be apportioned directly to those benefited, are not embraced by the doctrine.[28]

Sayles v. Bennett Avenue Development Corporation,[29] illustrates the operation of the doctrine in a controversy which could have been resolved by constitutional principles. The plaintiffs were all residents of an area of the City of Council Bluffs, Iowa, which was separated from the major part of the city by the Missouri River. The major part of the city had long been serviced by a municipal sewer system. Several years prior to the action, the defendant corporation was organized to provide sewer service to the residents of an area not within the city limits, but adjacent to the area in which the plaintiffs lived. The corporation and the city entered into a contract whereby the corporation would extend its facilities to the plain-

[24] This discussion relies substantially on Michelman, Obtaining a Fair Share of Municipal Services Through Legal Proceedings (undated memorandum written for the Civil Rights Law Institute of the NAACP Legal Defense and Educational Fund on file in the Hastings Law Library) [hereinafter cited as Municipal Services Memorandum].

[25] *See generally* Note, *The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM. L. REV. 312 (1962).

[26] *Id.* at 314-19.

[27] Municipal Services Memorandum, *supra* note 24, at 7.

[28] *Id.*

[29] 258 Iowa 628, 138 N.W.2d 895 (1965).

tiffs' area of the city. The effect of the arrangement, however, was that the sewer facilities would be provided "in such [a] fashion as to result in different and higher sewage charge . . . ."[30] The court enjoined the defendant from proceeding with its proposed plan and said:

> "[T]he obligation of mutual burden bearing which rests upon the congested population of cities and towns requires that the expense of making them convenient, comfortable, and healthful shall, so far as practicable, be equitably distributed upon all property enjoying the benefit . . . ." The burden . . . carries with it the concomitant rights to be treated fairly and equally in sharing this burden and receiving the benefits . . . .
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> . . . .
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> The other residents of the city are receiving cheaper service to meet the same needs. These residents are entitled to substantially equal treatment . . . .[31]

The public utility doctrine served as a much more effective basis for relief in this case than an equal protection argument would have been. From an equal protection perspective, since the plaintiffs were not from a racial minority group and therefore could not show unlawful classification based upon race, in order to obtain relief they would have had to claim that they were not classified in a rational manner which entitled the city to provide sewage at greater expense. But the additional costs incumbent in extending service across the river is just the type of rational basis for differential treatment or classification that the courts approve.[32]

Title VI of the 1964 Civil Rights Act

The Civil Rights Act of 1964 may also provide a basis for relief where municipal services are wholly or partially subsidized by federal funds, and the discrimination is within the scope of the prohibitions of the statute. The act provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[33] Both the regulations of the Department of Health, Education and Welfare and the Department of Housing and Urban Development, issued pursuant to this statute require that:

> A recipient, in determining the location or types of . . . facilities, services . . . or other benefits which will be provided under any [federally assisted] program or activity . . . may not . . . utilize cri-

[30] *Id.* at 637, 138 N.W.2d at 900.

[31] *Id.* at 638-39, 138 N.W.2d at 901, *quoting in part* Bell v. Burlington, 154 Iowa 607, 614, 134 N.W. 1082, 1084 (1912).

[32] *See generally* Municipal Services Memorandum, *supra* note 24, at 3-4.

[33] 42 U.S.C. § 2000d (1964).

> teria or methods of administration which have the *effect* . . . of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect persons of a particular race . . . .[34]

The importance of the term "effect" in these regulations is substantial. It should obviate the need to show *intentional* discrimination. This will be elaborated on later.[35] Of course, the Civil Rights Act is of no assistance where the deprived group is suffering only from economic rather than racial or ethnic disadvantages.

Development of Equal Protection Theory

Mr. Justice Holmes once said that the equal protection clause is "the usual last resort of constitutional arguments."[36] That there has been a change in judicial attitude from that expressed by Justice Holmes is well recognized.[37] The ascendancy of the equal protection clause was long ago recognized and presaged by Professors Tussman and tenBroek in the seminal article on the clause.[38] Sixteen years later, Professor tenBroek stated with continued foresight:

> [A]fter having been for nearly a century lost and forgotten or subverted by the separate but equal strategem, equal protection is again emerging. . . . The work in the name of equality is far from done. . . . Beyond the schools lie . . . public accommodations of every sort . . . housing, jobs, voting, police protection, and so on. And still beyond them all are poverty and the victims of poverty . . . where race prejudice, minority status, and many other social and personal factors are compounded.[39]

Edwards v. California—Ancestral Cousin

The purpose of this present discussion is to point out the growing recognition of the invidious nature of classifications founded upon economic status. It is quite appropriate to begin such a discus-

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[34] 24 C.F.R. § 1.4(b)(2) (1968) (emphasis added); *accord*, 45 C.F.R. § 80.49 (b)(2) (1968).

[35] See notes 79-82 and accompanying text *infra*.

[36] Buck v. Bell, 274 U.S. 200, 208 (1927).

[37] Nevertheless: "[T]he equal protection clause has consolidated its position as the cutting edge of our expanding constitutional liberty." Hobsen v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967). "[For a decade and a half] the decisions implementing the equal protection clause [have] set new constitutional goals for the states and the Congress, which lie substantially beyond accepted practices and whose achievement requires affirmative governmental action." Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights; The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91 (1966); *see* Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 211-12 (1964).

[38] Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

[39] J. TENBROEK, EQUAL UNDER LAW 15-16 (rev. ed. 1965).

sion with the legal treatment accorded the poor in *Edwards v. California.*[40] Mr. Justice Byrnes, speaking for the majority, held that a state could not exclude impoverished immigrants from its territory on the basis of its police power.[41] However, the holding was based on the pre-emption doctrine of the commerce clause rather than on individual rights. Mr. Justice Jackson, concurring, recognized the incongruity of treating humans on the basis of rules of trade. In his separate opinion, he preferred to rest the decision on the privileges and immunities clause of the fourteenth amendment:

> We should say now, and in no uncertain terms, that *a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States.* "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.[42]

The noteworthy aspect of this case for present purposes is that the poor, merely because of this status, were receiving constitutional recognition.[43]

Griffin v. Illinois—Paterfamilias

Fifteen years passed after *Edwards* was decided before the Court was squarely presented, in *Griffin v. Illinois,*[44] with the question whether rights could be denied or abridged because of a man's lack of command over enough wealth to assert them.

The State of Illinois, as most states, required the submission of a transcript of the proceedings in the lower court in an appeal from a conviction of a crime.[45] The Illinois statute also provided that "[w]rits of error in all criminal cases are writs of right and shall be

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[40] 314 U.S. 160 (1941).

[41] *Id.* at 173.

[42] *Id.* at 184-85 (emphasis added). Similar legislation had been upheld 104 years earlier. It was held to be both necessary and proper to protect the state from the "moral pestilence of paupers," as well as the "physical pestilence" of "infectious articles." New York City v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837). The last vestige of authority that *Miln* might have had has been dispelled by Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967) (three-judge court), *probable jurisdiction noted* 389 U.S. 820, *reargument ordered,* 392 U.S. 1919 (1968), and the numerous other cases striking down welfare residency statutes. The cases are collected in CCH POVERTY L. REP. ¶ 1200.22 (1968).

[43] For a discussion of the problem of constitutional recognition of minorities, see Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment,* 61 NW. U.L. REV. 363 (1966).

[44] 351 U.S. 12 (1956).

[45] ILL. REV. STAT. ch. 38, § 769.1 (1965) (writ of error in criminal case is writ of right); ILL. REV. STAT. ch. 110, § 101.65 (1965) (report of proceedings for direct criminal appeal).

issued of course."[46] The specific issue was whether a state could "administer this statute so as to deny adequate appellate review to the poor [by requiring a transcript of the trial proceedings which they could not obtain *only* because of their penury] while granting such review to others."[47] Griffin was convicted of a crime in Illinois, appealed, pleaded indigency and asked for a free transcript in order to prosecute his appeal. The request for a transcript was denied on the ground that free transcripts were available only to those convicted of capital crimes. Griffin, unable to provide a transcript, was denied an appeal. He brought the issue to the Supreme Court, alleging a denial of fourteenth amendment due process and equal protection.

Speaking for the majority, Mr. Justice Black, joined by the Chief Justice and Justices Douglas and Clark, agreed that both the due process and equal protection clauses required the state to provide a free transcript to indigent defendants in order to provide equal access to the appellate process, although an appeal was a matter of legislative grace and not a constitutional right.[48] Mr. Justice Frankfurter concurred *specially*, apparently resting his opinion on the equal protection clause.[49] Justices Burton, Minton, Harlan and Reed dissented.

Griffin falls within the class of cases, the leading one of which is *Yick Wo v. Hopkins*,[50] which holds that the unequal impact of a law fair on its face, without justification, constitutes a denial of equal protection.[51] This is a denial of equal protection of the laws which is as objectionable as the enactment of an expressly unequal statute. The *Griffin* case presented a dominant equal protection question, yet Justice Black persisted in averting to the due process clause as well. The due process discussion was not improper; the facts also presented an issue of "fundamental fairness" in the administration of criminal justice, which is the traditional office of the due process clause. It is, in fact, an excellent illustration of the overlap between equal protection and due process. The Court, in a series of subsequent cases, however, seems to indicate that the more substantial, if not exclusive, basis for its decision was equal protection.[52] Most of the commentators agree.[53]

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46 ILL. REV. STAT. ch. 38, § 769.1 (1965).

47 351 U.S. at 13.

48 *Id.* at 18. The latter point was an affirmation, by way of dictum, of McKane v. Durston, 153 U.S. 684, 687 (1894).

49 351 U.S. at 21-24.

50 118 U.S. 356 (1886).

51 *Id.* at 373-74.

52 It was stated in Burns v. Ohio, 360 U.S. 252 (1959), that "[t]he imposition by the State of financial barriers [here, a filing fee on appeal]

Before proceeding with the proposed application of the equal protection clause to the poor in civil cases involving inferior municipal services, it is necessary to examine the methods the courts currently use for its application.

The Varieties of Equal Protection Experience

Classifications—Reasonable or Unreasonable

Equal Protection cases can be divided into at least two basic categories. The majority of such cases can be resolved on the basis of the reasonable classification doctrine which involves the following three-step procedure. First, the purpose or objective that the state seeks to achieve is determined from the legislative or administrative act or, in many cases, it is divined by the court. Second, the means chosen to achieve the objective—the classification—is determined. Finally, the question is asked whether the means bears a reasonable (that is, logical) relationship to the objective sought to be achieved.[54] A good example of this type of case with some of the

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restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." *Id.* at 258. In Smith v. Bennett, 365 U.S. 708 (1961), the Court invalidated the imposition of a filing fee, stating: "We hold that to interpose any financial consideration between an indigent prisoner . . . and his exercise of a state right to sue for his liberty is to deny [him] the equal protection of the laws." *Id.* at 709. Although *Griffin* and *Burns* were cited, no reference to due process was made. Finally, the taxing of unsuccessful indigent criminal appellants for the costs of providing transcripts, to be paid from their prisonhouse earnings, was invalidated in Rinaldi v. Yeager, 384 U.S. 305 (1966). The Court relied solely on equal protection. *Contra*, Harper v. Board of Elections, 383 U.S. 663, 682 n.3 (1966) (Harlan, J.) (dissenting opinion); Douglas v. California, 372 U.S. 353, 361 n.1 (1963) (Harlan, J.) (dissenting opinion). Justice Harlan's dissents, in these and other cases, strongly confirm that the true basis of these dicisions is equal protection; since the court was entering new territory, it had to be more circumspect; as a dissenter, he had no need (and little stomach) for the ambiguity.

[53] *See, e.g.*, Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 157 (1957); McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 676-77 (1963); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 10 (1956); Willcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 10-11 (1957); *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 95, 126-28 (1956); Note, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 396 (1964). *But see* Hamley, *The Impact of Griffin v. Illinois on State Court-Federal Court Relationships*, 24 F.R.D. 75, 79 (1960).

[54] See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344-53 (1949), for an extensive exposition of the reasonable classification analysis and its five logical possibilities: pure reason, pure un-

typical rhetoric is *Allied Stores v. Bowers.*[55] An Ohio statute exempted from ad valorem taxation "*merchandise . . . belonging to a non-resident . . . if held in a storage warehouse for storage only . . . .*"[56] The Court upheld the statute stating:

> The rule often has been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415. "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the Law." *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573. . . .
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> . . . . Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of [equal protection] . . . *if any state of facts reasonably can be conceived that would sustain it.*[57]

Most cases in this category involve economic regulation, almost all of which are sustained.[58] There are two important characteristics of the analytical framework relative to the reasonable classification doctrine: (1) The court does not question the purpose or objective of the state; and (2) considerable latitude is given to the means chosen (the classification) to achieve the stated or divined purpose, with few such means found to be "arbitrary" or "capricious."[59] Consequently this categorical treatment would be unlikely to be useful in challenging the inadequacy of municipal services. But the protections of the clause are not exhausted by the reasonable classification doctrine.

Classifications—Suspect

The second category of equal protection cases is smaller in number but more significant for purposes of this discussion. This category involves the "suspect" classification doctrine, and unlike the reasonable classification doctrine the existence of a rational relationship between the classification and the purpose of the law does not end the inquiry.[60] The practical effect of the utilization of

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reason, under-inclusiveness, over-inclusiveness, and under-and-over-inclusiveness.

[55] 358 U.S. 522 (1959).

[56] 115 Ohio Laws 553 (1933).

[57] Allied Stores v. Bowers, 358 U.S. 522, 527-28 (1959) (emphasis added).

[58] *E.g.*, American Sugar Ref. Co. v. Louisiana, 179 U.S. 89 (1900); Brown-Forman Co. v. Kentucky, 217 U.S. 563 (1910). *But see* Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

[59] The legislative judgment "is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary . . . ." McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

[60] Striking down a law making criminal the cohabitation of a Negro

traits which are deemed "suspect" (of suspect validity under the equal protection clause) is to make the classification presumptively unconstitutional.[61] The courts speak of such traits as "constitutionally suspect,"[62] "traditionally disfavored,"[63] "presumptively suspect,"[64] or "inherently suspect."[65] The suspect classification doctrine frequently requires a result different from that which would be achieved by application of the reasonable classification doctrine. For example, in the *Griffin* case "there was a rational basis for this . . . policy—to expend available funds in the most effective way by providing transcripts to indigents only in more serious cases."[66] Yet

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and a white person, the Court in *McLaughlin v. Florida* said: "Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . and will be upheld only if it is necessary, and *not merely* rationally related, to the accomplishment of a permissible state policy." *Id.* at 196 (emphasis added).

[61] Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 353-61 (1949).

The authors also discuss a concept which they designate the "forbidden classification." This would invalidate *any* classification based upon certain traits. They suggest that the "chief value of the doctrine" would be in striking down "segregation laws." *Id.* at 355. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 666 (1963), also speaks of classifications which are forbidden "because none is permissible, as in segregation cases . . . ." The value of such "absolute" absolutes in human affairs is questionable. *See, e.g.*, Hamm v. Board of Elections, 230 F. Supp. 156 (E.D. Va.), *aff'd sub nom.*, Tancil v. Woolls, 379 U.S. 19 (1964), which upheld a law requiring the racial designation of parties to a divorce decree for statistical purposes. In Loving v. Virginia, 388 U.S. 1 (1967), Chief Justice Warren said that if racial classifications "are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective." *Id.* at 11. Valid racial classifications, therefore, presumably encompass statistical data and restrictions based on national origin in a national emergency. Tancil v. Woolls, *supra*; Korematsu v. United States, 323 U.S. 214 (1944).

For suggestions by individual members of the Court urging the recognition of the forbidden classification of race, see Loving v. Virginia, *supra* at 13 (Stewart, J.) (concurring opinion); McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J.) (concurring opinion); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 564-67 (1947) (Rutledge, J.) (dissenting opinion).

[62] McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (de jure racial segregation).

[63] "Lines drawn on the basis of wealth or property . . . are traditionally disfavored." Harper v. Board of Elections, 383 U.S. 663, 668 (1966).

[64] Thompson v. Shapiro, 270 F. Supp. 331, 337 (D. Conn. 1967), *probable jurisdiction noted*, 389 U.S. 1032, *reargument ordered*, 392 U.S. 1919 (1968).

[65] Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968) (Harlan, J.) (dissenting opinion).

[66] Horowitz, *Unseparate But Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. REV. 1147, 1156 (1966). The four dissenters in *Griffin* urged this point, but Justice Black ignored it in the majority opinion. Justice Harlan said: "A policy of economy may be un-

the Supreme Court found the policy to be a denial of equal protection of the laws.

Race, economic status, and place of residence in the reapportionment cases have been accorded "suspect" status. Recently, bastardy was added, in *Levy v. Louisiana*,[67] where the denial to illegitimate children of the right to maintain an action for their mother's wrongful death was held to constitute "an invidious classification."[68] These classifications are expressive of what Chief Justice Stone spoke of as "prejudice against discrete and insular minorities" in his well-known "footnote four" in *United States v. Carolene Products Company*.[69] Judge Skelly Wright recently offered one of the few subsequent judicial amplifications of Chief Justice Stone's well-known dictum. In explaining the necessity and purpose of the suspect classification doctrine, he said:

> The explanation for this additional scrutiny of practices which . . . fall harshly on [the poor and racial minorities] relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of . . . judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary.[70]

A common thread running throughout the cases in this area of equal protection consideration, illustrated in *Levy v. Louisiana*,[71] is the use of the term "invidious." One meaning of the term is that it expresses "hateful" or "spiteful" motives.[72] Another recurring

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enlightened, but it is certainly not capricious." *Id.* at 37-38. *But see* Green v. Department of Pub. Welfare, 270 F. Supp. 173, 177 (D. Del. 1967) (three-judge court): "The protection of the public purse, no matter how worthy in the abstract, is not a permissible basis for differentiating between persons who otherwise possess the same status in their relationship to the State . . . ." The statute held violative of equal protection imposed a one-year residency requirement as a condition to the receipt of public assistance and it was enacted to "protect the public purse." *Id.* *See also* Rinaldi v. Yeager, 384 U.S. 305 (1966).

[67] 391 U.S. 68 (1968).

[68] *Id.* at 71; *accord*, Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

[69] 304 U.S. 144, 152 n.4 (1938).

[70] Hobsen v. Hansen, 269 F. Supp. 401, 507-08 (D.D.C. 1967).

[71] 391 U.S. 68 (1968).

[72] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

phrase, and analytical device, appearing in these cases is that a suspect classification is subject to the "most rigid scrutiny."[73]

But if these classifications are so suspect, and are subject to such rigid scrutiny, of what are they suspect, and for what must they be scrutinized? First, they must be scrutinized for unreasonableness; that is, the degree to which the classification does not include all persons who are similarly situated with respect to the purpose of the particular law. In these cases, a much stricter standard of a logical relationship between the end (legislative purpose) and the means (classification) is required. An excellent example is the previously mentioned case of *Levy v. Louisiana.*[74] The purpose of wrongful death statutes is to compensate in damages members of the family of a decedent who might have been expected to receive support or assistance from him had he lived. The Court held that "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong . . . inflicted" by the tortfeasor on the decedent and on those who are dependent upon his support,[75] and accordingly struck down the exclusion of illegitimates by Louisiana law.

The second object of most rigid scrutiny is the purpose or motive behind the law. In any equal protection case, it is necessary to determine the legislative purpose. The Court has done so, "however vigorously it may protest the contrary."[76] Explicit use of the term "purpose" is frequently found, especially in the suspect classification cases.[77] But the term "motive" is usually found in a statement that motives of the legislature are not questioned by the Court.[78] Only a few of the Justices have been explicit in admitting their inquiry into Legislative motives.[79] This reluctance is understandable considering the nature of our federal system; as a consequence, the Court prefers to speak of the "result" or the "effect" rather than the "motive" behind the act or action. Professors Tussman and tenBroek explain the equivalence of these terms as follows:

> The fact that the Court sometimes speaks of laws as discrimi-

[73] Korematsu v. United States, 323 U.S. 214, 216 (1944); *see* Loving v. Virginia, 388 U.S. 1, 11 (1967).

[74] 391 U.S. 68 (1968). See text accompanying notes 67-69 *supra.*

[75] Levy v. Louisiana, 391 U.S. 68, 72 (1968).

[76] Van Alstyne & Karst, *State Action,* 14 STAN. L. REV. 3, 21-22 (1961).

[77] *See, e.g.,* Reitman v. Mulkey, 387 U.S. 369, 373-74 (1967); Rinaldi v. Yeager, 384 U.S. 305, 309 (1966).

[78] *See, e.g.,* Tenny v. Brandhove, 341 U.S. 367, 377-78 (1951).

[79] *Compare* Oyama v. California, 332 U.S. 633, 661 (1947) (Murphy, J.) (concurring opinion) (California Alien Land Law product of "the great anti-Oriental virus"), *with* Yick Wo v. Hopkins, 178 U.S. 356, 374 (1886), where Mr. Justice Mathews stated while dissenting that "[no] reason for [the classification] exists except hostility to the race and nationality to which petitioners belong . . . ."

> natory in "result" does not really broaden the discriminatory legislation category beyond the field of motive. For the situation is generally one in which—as for example in the *Yick Wo* and *Kotch* cases—the challenged statute on its face is quite innocuous. Only its application reveals the result that the classification falls along lines of race or consanguinity. This result raises the question of whether the classification, treated as "suspect" meets the reasonable relation test or whether it is the expression of a discriminatory motive. It is thus, apart from the classification problem, purely a question of motive.[80]

Ought we then insist that courts directly consider motive in the interests of purity of analysis? Not really. There is a multitude of cases which clearly establish that it is not necessary to prove a discriminatory motive on the part of state officials in order to establish a violation of the equal protection clause.[81] "[T]houghtlessness can be as disasterous and unfair to private rights and the public interest as the perversity of a willful scheme."[82] That the constitutionality of a state statute, policy, or administrative action may be tested by its operation and effect as well as by the meaning of its bare terms is a corollary of the special solicitude of the Constitution for those with limited access to the political process.[83]

Poverty and Equal Protection

The essence of the foregoing discussion is that governing entities are prohibited by the equal protection clause from using "suspect" classification schemes, *e.g.*, schemes based upon race,[84] territory,[85]

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[80] Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 359 n.36 (1949).

[81] *E.g.*, Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

[82] *Id.* at 497; *see* Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968). For example, note the following rhetoric espoused by various justices. Justice Douglas said that "strict scrutiny of the classification . . . is essential, lest *unwittingly, or otherwise*, invidious discriminations are made against groups or types of individuals . . . ." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (emphasis added). Justice White, concurring, felt that "a statute with these *effects* bears a substantial burden of justification when attacked under the Fourteenth Amendment." Griswold v. Connecticut, 381 U.S. 479, 503 (1965) (emphasis added). Chief Justice Warren, in Reynolds v. Sims, 377 U.S. 533 (1964), stated that "the *effect* of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is . . . discrimination against those individual voters living in disfavored areas . . . ." *Id.* at 562-63 (emphasis added). Judge Wisdom has added to the rhetoric by stating that "[a] benign and theoretically neutral principle loses its aura of sanctity when it fails to *function* neutrally." Labat v. Bennett, 365 F.2d 698, 724 (5th Cir. 1966) (emphasis added).

[83] *Cf.* Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967).

[84] *E.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (de jure racial segregation in public schools); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) (alternative holding) (de facto racial segregation in public schools).

[85] *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (differential weight of a

or to a limited extent economic status[86] in the governing process. For example, the plaintiffs in *Hawkins v. Shaw*[87] and *Harris v. Itta Bena*,[88] the two actions filed in the federal district court in Mississippi for sub-standard municipal services discussed in the introduction to this article, alleged that three classes of discrimination were present in the denial of adequate services—race, residence and poverty. It is clear that if the residents of an under-serviced area also constitute a well defined racial group, their cause will be strengthened by the racial discrimination argument. Nevertheless, it is important that economic status alone be accorded singular recognition by the courts as a reason for forbidding sub-standard municipal services.

The economic status argument for invalidating classifications under the equal protection clause has a more universal application than does the racial classification argument; many northern cities and towns have few minority residents and yet have numerous underserviced neighborhoods. Furthermore, the economic status argument forecloses the contention that there is in fact no racial discrimination because Caucasians live in the affected area as well as the particular racial minority, or minorities, alleged to have been discriminated against. For example, it has been said of *Harper v. Board of Elections*,[89] where the Virginia poll tax was invalidated because of its effects on the poor (*not* because of racial considerations) that "the new status of indigence . . . reflects the turning of America's conscience from the narrow problems of Negro rights to a wider recognition of the disadvantaged position of the poor of all races."[90] The *Harper* decision has added significance in that the petitioners had based their assertion of the statute's invalidity solely upon indigency.[91]

The economic status argument is applicable to numerous areas of local governmental control which have heretofore received inadequate scrutiny. These are areas where economic position substan-

citizen's vote based upon his place of residence within a state); Griffin v. School Bd., 377 U.S. 218, 229-31 (1964) (dictum); Hall v. School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962) (public school system dismantled to avoid a desegregation order).

[86] *E.g.*, Harper v. Board of Election, 383 U.S. 663 (1966) (poll tax impermissible classification based on economic status of voter); Douglas v. California, 372 U.S. 353 (1964) (right to counsel); Griffin v. Illinois, 351 U.S. 12 (1956) (indigent's right to trial transcript).

[87] Civil No. DC6737, CCH POVERTY L. REP. ¶ 2400.40 (N.D. Miss., filed Nov. 21, 1967).

[88] Civil No. GC6756 (N.D. Miss., filed Nov. 21, 1967).

[89] 383 U.S. 663 (1966).

[90] *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 180 (1966).

[91] Harper v. Board of Elections, 383 U.S. 663 (1966).

tially affects the quality of service or of opportunity provided by the government. For example: The quality of education available to children within any local school district is dependent largely upon the value of real property within that district;[92] court fees or bonds may effectively deny access to courts for civil litigants;[93] the ability of an indigent to litigate a civil action effectively obviously depends on his access to counsel;[94] the indigent criminal defendant may require non-legal assistance, such as that provided by psychiatrists and investigators, but for which he cannot pay;[95] the amount of bail set in criminal cases most often depends on the seriousness of the offense, not on the ability of the accused to make bail;[96] vagrancy statutes provide criminal punishment for those who exist in the condition of poverty;[97] the alternative sentence of fine or imprisonment is a highly illusory choice to the indigent.[98]

At this juncture it should be reiterated that a municipal equalization case based entirely upon discrimination on the basis of economic

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[92] *See generally* Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A.L. REV. 787 (1968); Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public Education*, 13 U.C.L.A.L. REV. 1147 (1966).

Among all elementary school districts in California in 1965-66, the variation in assessed valuation, per unit of average daily attendance, was $57 to $2,187, a ratio of more than 38:1. Two cases are now pending before the California courts on this issue. Silva v. Atascadero Unified School Dist., No. 595954 (Super. Ct., San Francisco City and County, Cal., filed Sept. 26, 1968); Serrano v. Priest, No. 938254 (Super. Ct., Los Angeles County, Cal., filed Aug. 23, 1968).

[93] *See* Williams v. Shaffer, 385 U.S. 1037, 1039 (1967) (Douglas, J.) (dissenting opinion). *See generally*, Note, *Poverty and Equal Access to the Courts: The Constitutionality of Summary Dispossess in Georgia*, 20 STAN. L. REV. 766 (1968).

[94] *See generally* Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967).

[95] *See generally* Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061 (1962); Weihofen, *Mental Health Services for the Poor*, 54 CALIF. L. REV. 920 (1966).

[96] *See generally* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959 (1965).

[97] *Cf.* Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967), which held New York's vagrancy statute unconstitutional as an overreaching of the police power. *See generally* Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

[98] United States *ex rel.* Martin v. Erwin, CCH POVERTY L. REP. ¶ 750.20 (W.D. La. Feb. 27, 1968) (alternative sentence violative of equal protection where defendant not allowed to pay fine in installments); *accord In re* Figueroa, No. 4502-C (Super. Ct., Mendocino County, Cal., filed Oct. 31, 1968).

status would have little chance of success.[99] With a racial discrimination claim, however, support could be drawn from the pre-*Brown v. Board of Education*[100] decisions which were concerned with equalizing school facilities during the separate but equal era.[101]

Notwithstanding the present posture of the law, two recent decisions, one in the Supreme Court, *Harper v. Board of Elections*,[102] and the other in the Federal District Court of the District of Columbia, *Hobson v. Hansen*,[103] have extended the principle that discrimination on the basis of economic status is violative of equal protection. The foundation for this extension is the previously discussed case of *Griffin v. Illinois*,[104] in which the Court introduced a new suspect classification, discrimination on the basis of economic status,[105] giving substance and force to the single voice of Mr. Justice Jackson in *Edwards v. California*.[106] None of the opinions in *Griffin* discussed the necessity for an intentionally unfair discrimination.[107] The rational basis supporting the practice—that of protecting public funds from depletion by a required furnishing of transcripts to indigents—was insufficient to overcome the invidious nature of the classification. Justice Harlan recognized that the majority opinion held "that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances."[108] Indeed!

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[99] See text following note 88, *supra*.

[100] 347 U.S. 483 (1954).

[101] *See, e.g.*, McKissick v. Carmichael, 187 F.2d 949 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951) (general physical condition of school buildings); Pitts v. Board of Trustees, 84 F. Supp. 975 (E.D. Ark. 1949) (sewerage, toilet, and drinking fountain facilities). *See generally* Leflar, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377 (1954).

[102] 383 U.S. 663 (1966).

[103] 269 F. Supp. 401 (D.D.C. 1967).

[104] 351 U.S. 12 (1956).

[105] *But see* Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 155-56 (1957), where similar *unarticulated* reasoning in Cochran v. Kansas, 316 U.S. 255 (1942), and Dowd v. Cook, 340 U.S. 206 (1951), is analyzed.

[106] 314 U.S. 160 (1941).

[107] See text and authorities at notes 80-82 *supra*, for the lack of vitality of this requirement in a suspect classification case.

"Thus Griffin is based on the totally novel doctrine that unintentional and accidental inequality, if it affects important rights of the poor, violates equal protection to the same extent as does intentional hostile, aggressive, and invidious discrimination." Jeffries v. Jeffries, 37 U.S.L.W. 2337 (N.Y. Sup. Ct., Dec. 6, 1968) (state is required by equal protection to pay cost of service of publication in indigent's divorce action).

[108] 351 U.S. at 34 (dissenting opinion).

Harper v. Board of Elections

The breakthrough into civil matters of the principle disallowing discrimination based upon economic status came in *Harper v. Board of Elections*,[109] which struck down the Virginia poll tax because of its discriminatory *effect* on the voting rights of the poor. Mr. Justice Douglas said: "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. [Citing *Edwards* and *Griffin*]. The degree of discrimination is irrelevant."[110] One commentator thought it somewhat "surprising that they based their discrimination argument on indigency rather than race . . ." though he recognized that studies had indicated that the tax had deterred more poor "whites than Negroes from voting."[111] This can be interpreted as a recognition by the Court that racial problems are subsumed under and subsidiary to the problems of the poor.[112]

It should be noted that Mr. Justice Douglas, in his opinion in *Harper*, strengthened the equal protection clause, clarified the analysis of *Brown v. Board of Education*, and gave a further doctrinal rationale to *Griffin v. Illinois*. In *Brown*, Chief Justice Warren said: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[113] Returning to this theme in *Harper*, Mr. Justice Douglas said:

> [T]he Equal Protection Clause is not shackled to the particular theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality . . . . Notions of what constitutes equal treatment for the purposes of [the clause] *do* change.[114]

Hobson v. Hansen

The current, yet not final, stage of development of constitutional protection of the poor is represented by *Hobson v. Hansen*,[115] where Judge Skelly Wright held that de facto segregation and the track system[116] was violative of equal protection because it constituted discrimination "on the basis of racial or economic status in the operation of the District of Columbia public school system."[117] Plain-

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109 383 U.S. 663 (1966).

110 *Id.* at 668.

111 *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 177 (1966).

112 See the findings of fact of Judge Skelly Wright in Hobson v. Hansen, 269 F. Supp. 401, 405-07, 431-32, 451-52 (D.D.C. 1967).

113 Brown v. Board of Education, 347 U.S. 483, 492 (1954).

114 Harper v. Board of Elections, 383 U.S. 663, 669 (1966).

115 269 F. Supp. 401 (D.D.C. 1967).

116 *Id.* at 442 (track system explained).

117 *Id.* at 517. *See generally* Note, *Hobson v. Hansen: Judicial Super-*

tiffs introduced evidence of deliberate, discriminatory intent; defendants introduced evidence of a lack of such intent; Judge Wright rejected both arguments saying that "[t]he causes of the inequalities are relatively objective and impersonal. School officials can be faulted, but for another reason: that in the face of these inequalities they have sometimes shown little concern."[118] The constitutional infirmity found by the court was the operation and *effect* of the school district's policies. Throughout his opinion, Judge Wright recognized the combination of effects upon one who is both a member of a racial minority and poor.[119] But he also recognized that the existence of both factors was not constitutionally necessary, saying: "even if race could be ruled out, which it cannot, defendants surely 'can no more discriminate on account of poverty than on account of religion, race or color.' [Citing *Griffin*]."[120] In sum, *Hobson v. Hansen* held that where policies, benign or inept, result in the unequal provision of municipal services to racial minorities or to the poor, municipal authorities are constitutionally obliged by the equal protection clause both to discontinue these policies and to take affirmative action to ensure equality.[121]

The Principle Applied

Schools and Sewers?

In *Hobson*, the municipal service considered was an educational facility. What of *other* municipal services? Is their provision a right less worthy of protection? The decision of the Supreme Court in *Katzenbach v. Morgan*[122] is instructive.

In *Katzenbach v. Morgan*, the Court was presented with the question of the validity of section 4(e) of the Voting Rights Act of 1965 which provides in pertinent part:

> [In order] to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in . . . English . . . .[123]

vision of the Color-Blind School Board, 81 HARV. L. REV. 1511 (1968); Comment, *Hobson v. Hansen: The De Facto Limits on Judicial Power*, 20 STAN. L. REV. 1249 (1968).

118 Hobson v. Hansen, 269 F. Supp. 401, 441-42 (D.D.C. 1967).

119 *Id.* at 443, 482, 483.

120 *Id.* at 513.

121 The school district was required to provide transportation for children who volunteered to enroll at other schools. *Id.* at 517.

122 384 U.S. 641 (1966).

123 Voting Rights Act of 1965, § 4(e)(1), 79 Stat. 439 (1965) (emphasis added) (codified in 42 U.S.C. § 1973(b)(e)(1), Supp. I, 1965). Section 4(e)(2)

The Court upheld the Act as a "necessary and proper" exercise of congressional power under section five of the fourteenth amendment which grants Congress the "power to enforce, by appropriate legislation, the provisions of this article."[124] The question whether a literacy requirement itself violates the equal protection clause was not reached. However, Mr. Justice Brennan, speaking for the Court, stated that the granting of suffrage, and therefore political representation, would be a means of rectifying violations of the amendment not related to voting. He said:

> More specifically, § 4(e) may be viewed as a measure to secure for the Puerto Rican community . . . nondiscriminatory treatment by government . . . [in] the provision or administration of governmental services, such as public schools, public housing and law enforcement. . . . This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and the equal protection of the laws."[125]

This reasoning inferentially supports the conclusion that the equal protection clause *can* be held applicable to municipal services other than education.[126]

In answering the question whether it *should* be so applied, it need only be asked whether dirty, filthy streets, unlit at night, beckoning the criminal, awash during winter storms, engender in those who live in such under-serviced areas "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[127] Is the availability of an attractive fun-filled playground *less* important to the heart and mind of a ten-year old boy than is a new school? Perhaps some may think so, but *he* probably does not.

Which Services?

Municipal services can be said to fall into two broad categories: (1) those which are general in character, in that they confer a gen-

restricts the operation of section 4(e)(1) to those who have completed the sixth grade in a Puerto Rican school where instruction was in Spanish. 42 U.S.C. § 1973(b)(e)(2) (Supp. I, 1965).

[124] This is the familiar *McCulloch v. Maryland* test applicable to the validity of the exercise of a congressional power. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). For a similar analysis of section 5 of the fourteenth amendment, see United States v. Guest, 383 U.S. 745, 762, 782 (1966) (concurring opinions).

[125] 384 U.S. at 652-53.

[126] For similar interpretations of *Katzenbach* see Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights, The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 103 (1966); *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 125, 173 (1966).

[127] Brown v. Board of Education, 347 U.S. 483, 494 (1954).

eral benefit on the whole community;[128] and (2) those which are local in character, in that they confer benefits upon individual parcels of property. The approach taken in order to apply the foregoing equal protection argument to each category must vary, depending to a great extent upon the character of the expenditure necessary for the provision of the service and the action or inaction of the municipality relative to its provision.

Local improvements consist generally of the construction of streets, sidewalks and sewers.[129] The recipients of the benefits of local improvements are held accountable to pay for those benefits by means of special tax assessments against their property. "The benefits conferred are *at least* full compensation for the expense imimposed . . . ."[130]

Special assessments ordinarily are not levied for the maintenance and repair of the improvements after their original construction, even though additional benefits clearly accrue to the adjacent property owner from these services.[131] The funds for these expenditures stem from general municipal revenues. The fact that such expenditures are made from general revenues constitutes a significant deviation from the principle which supports special assessments—that those who receive the benefits must pay for them. If it can be shown that the costs of maintenance and repair constitute a significant proportion of the original cost of the improvement, the refusal to provide such improvements by a reliance on special assessment rationale, that is, a refusal to provide because adjacent owners could not absorb the initial cost of the improvement, would be quite vulnerable to an extension of the *Griffin* principle. If the maintenance costs would be a significant amount in relation to the initial improvement cost, the assessed residence would not be paying for the benefits it receives. The effect of the application of *Griffin* would be to require that both original construction and the maintenance expenditures be made from general revenues, thereby ensuring adequate and much needed services to those unable to meet the original assessment.

In addition, where some municipalities within a state provide certain services by means of special assessments and others provide the same services by means of general revenues, an argument can be made that territorial uniformity is required. Authority for this proposition can be provided by analogy to those cases which hold that a

128 14 E. McQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 38.11 (3d ed. 1950).

129 *Id.* at §§ 38.12, 38.24.

130 *Id.* § 38.02, at 20-21 (emphasis added), *quoting* Whitmore v. Hartford, 196 Conn. 511, 512, 114 A. 686, 689 (1921).

131 14 E. McQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 38.25 (3d ed. 1950); see 13 McQUILLAN, *supra* note 14, at § 37.113.

state cannot allow the dismantling of public education in one area of the state while providing such education in the remaining areas.[132] The obvious danger in making this argument is that the state may elect the special assessment alternative instead of the general revenue method of financing municipal services. This election would, of course, bring the state within the ambit of the problems discussed in the preceding paragraphs of this section.

Services of a general character present two major issues in a municipal equalization case: The situs and the adequacy of the service provided. Park and recreation facilities and libraries provide good examples. Where such facilities exist in the more affluent areas (or white areas, if a claim of racial discrimination is made) of the municipality and comparable facilities do not exist in the areas occupied by poor residents, the site selection policy of the municipality is subject to question. *Gautreaux v. Chicago Housing Authority*[133] held that racial considerations in the selection of public housing project sites are prohibited by the equal protection clause. While the plaintiffs in *Gautreaux* sought to have the housing project built in a white neighborhood, *not* in their own, the reasoning would seem applicable to a situation in which the residents seek the construction of a public facility, such as a park or a library, in their neighborhood. As discussed earlier, under the equal protection clause considerations of wealth would seem no more permissible than those of race.

Where facilities or services *are* provided in the less affluent areas of a municipality, the question of equalization concerns the adequacy of the service. These problems are largely factual once the concept of equalization is recognized, and their solution will depend upon the circumstances of each case. For example, the *Riot Commission Report* states that in New York City there are six garbage pickups weekly in slum areas, compared to thrice-weekly pickups in other areas. Yet, due to significantly higher population densities and other

[132] Griffin v. School Bd., 377 U.S. 218 (1964); Hall v. School Bd., 197 F. Supp. 649 (E.D. La. 1961); Bush v. School Bd., 187 F. Supp. 42 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark.), *aff'd sub nom.* Faubus v. Aaron, 361 U.S. 197 (1959). *See generally* Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State*, 15 U.C.L.A.L. REV. 787 (1968).

[133] 265 F. Supp. 582 (N.D. Ill. 1967). Defendant's motion to dismiss was granted because plaintiffs failed to allege that the site selection policy was *deliberately* intended to discriminate against them on the basis of race. The Court acknowledged that inferential evidence of such intent should be sufficient; it did not, however, agree that the policy was constitutionally invalid if its operation and effect of the policy was to discriminate against the plaintiffs.

factors, garbage collection still may be found to be inadequate in the slum area.[134]

Conclusion

Unequal provision of services by municipalities is often the result of a complex interaction of the race, economic status and inadequate political representation of the residents of underserviced areas. Recognition of the problem as one amenable to an equal protection analysis based on the economic status of the affected individuals would facilitate dealing with the problem in its broadest aspect. Furthermore, adoption of the principle that the constitutionality of a state statute or policy can be tested by its operation and effect will overcome the possibilities of subterfuge inherent in the requirement of proof of intentional discrimination. Although the courts have yet to deal with many of the issues in this area in a specific manner, the urgency of this problem and its effect upon millions of Americans dictates immediate consideration.[135]

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[134] See note 3 *supra.*

[135] *See* San Francisco Examiner, Jan. 8, 1969, at 40, cols. 1-2: "A Rat's a Rat.

One of the more bizarre news stories of the week concerns the discovery of a bustling rat colony right in the middle of New York's exclusive Park Avenue. Health Department exterminators quickly appeared.

That leads us to wonder. If official reaction to reports of rats in the slums were as prompt as it was on the exclusive stretch of Park Avenue, wouldn't there be millions fewer rats in the United States today? A rat is a rat, and every American is entitled to equal protection under the health laws."